

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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P/S
75-1310

To be argued by
EDWARD J. KURIANSKY

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-1310

UNITED STATES OF AMERICA,
Appellant,

—v.—

ANTHONY LOSCHIAVO,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AND
SUGGESTION FOR HEARING IN BANC

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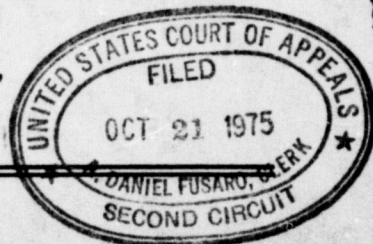


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**BRIEF FOR THE UNITED STATES OF AMERICA AND
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Preliminary Statement

The United States of America appeals, with the suggestion that said appeal be heard in banc, from an order entered in the United States District Court for the Southern District of New York on June 17, 1975 by the Honorable Charles M. Metzner, United States District Judge, granting Loschiavo's motion pursuant to Title 28, United States Code, Section 2255 to vacate the judgment of conviction and sentence imposed upon him on Count Two of Indictment 73 Cr. 290 on December 11, 1973, after a five day trial before Judge Metzner and a jury.

Indictment 73 Cr. 290 (CMM), filed on April 4, 1973, charged defendants Anthony Loschiavo, Andrew Storms and Kingdon DeWitt with conspiring with co-conspira-

tors John Sanders and Pedro Morales* to defraud the United States in violation of Title 18, United States Code, Section 371; charged Loschiavo and Storms with bribery in violation of Title 18, United States Code, Sections 201 and 2; and charged the defendant Loschiavo with two counts of perjury, co-defendant Storms with four counts of perjury and co-defendant DeWitt with five counts of perjury, in violation of Title 18, United States Code, Section 1623.

On October 17, 1973, Andrew Storms pleaded guilty to the conspiracy count, and on October 19, 1973, Kingdon DeWitt pleaded guilty to one of the perjury counts.**

The trial of Loschiavo commenced on October 24, 1973 and ended on October 30, 1973, when the jury returned a verdict of guilty on the bribery count (Count Two), not guilty on the conspiracy to defraud count (Count One) and one of the perjury counts (Count Four), and failed to reach a verdict as to the other perjury count (Count Three).

On December 11, 1973, Judge Metzner sentenced Loschiavo to imprisonment for one year and a \$5,000 fine.

* Sanders and Morales, the Acting Director and Deputy Director, respectively, of the Harlem-East Harlem Office of the New York City Model Cities Administration, were indicted separately in a ten count indictment, 73 Cr. 288, filed April 4, 1973, which charged both defendants with this and two other conspiracies involving a total of \$51,000 paid by various businessmen to obtain camping contracts and building leases with Model Cities. Both Morales and Sanders pleaded guilty to one of the counts in that indictment. On November 30, 1973, Judge Metzner sentenced Sanders to two years imprisonment, and on September 27, 1974, Judge Metzner sentenced Morales to three years probation.

** On November 26, 1973, Judge Metzner sentenced Storms to four months imprisonment and DeWitt to six months imprisonment.

His conviction was affirmed by this Court without opinion on March 14, 1974, *United States v. Loschiavo*, 493 F.2d 1399, and, following the denial by this Court and the Supreme Court of his applications to stay the mandate pending determination of his petition for a writ of *certiorari*, Loschiavo surrendered to begin serving his sentence. The Supreme Court denied *certiorari* on October 15, 1974. 419 U.S. 872 (1974). On February 24, 1975, Judge Metzner, on his own motion, entered an order dismissing the outstanding perjury count against Loschiavo.

Proceedings Below

On May 5, 1975, following completion of service of his one year prison term and payment of his fine, Loschiavo brought the instant motion to vacate his bribery conviction under Title 28, United States Code, Section 2255 on the ground that the public official he was convicted of bribing was not a federal public official as defined in 18 U.S.C. § 201(a). On June 17, 1975, Judge Metzner, relying on this Court's intervening decision in *United States v. Del Toro*, 513 F.2d 656 (Decided February 27, 1975), *cert. denied*, 44 U.S.L.W. 3185 (October 6, 1975), granted the motion.

Statement of Facts and Reasons for the Government's Suggestion that this Appeal be heard in banc

Rule 35(a), F. R. App. P., provides, in pertinent part, that an in banc hearing on appeal may be ordered "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." The Government respectfully submits that on both these grounds in banc hearing of the instant appeal is warranted.

The *Loschiavo* and *Del Toro* cases present substantially similar fact patterns and arose out of the very same investigation jointly conducted by the United States Attorney's Office and the New York City Department of Investigation into widespread corruption within the federally funded and supervised New York City Model Cities Administration. This year long probe ultimately resulted in the indictment and conviction of nine individuals, including both corrupt Model Cities officials and private businessmen alike.

The facts relevant to this appeal, as adduced at both the *Del Toro* and *Loschiavo* trials, are largely undisputed and may be summarized briefly.* In view of the similarity of the two cases and the apparent inconsistency in the holdings of the *Del Toro* and *Loschiavo* appellate panels, a general understanding of the facts in each case is necessary for resolution of the instant appeal.

In *Del Toro*, the Government's proof established that William Kaufman, a lawyer and real estate broker, William Del Toro, the head of a large East Harlem anti-poverty agency (MEND) and at the time a candidate for the New York City Council, and Ralph Ruocco, assistant to the president of a New Jersey corporation, offered a \$15,000 bribe, of which \$500 was actually paid, to Pedro Morales, Assistant Administrator of the Harlem-East Harlem Model Cities Program, to obtain a lucrative lease on a building owned by Ruocco's company. Kaufman, the rental agent for the building, stood to make a substantial brokerage commission on the transaction and hoped that in return for the bribe Morales would use his

* A full statement of the facts in the *Del Toro* case may be found in this Court's opinion in *United States v. Del Toro*, *supra*, 513 F.2d at 658-660, and in the Government's Brief on appeal, at pp. 3-25. Similarly, the Government's Brief on direct appeal in the *Loschiavo* case sets forth the evidence in detail at pp. 2-11.

official position to secure the lease for Kaufman. Del Toro, whose own anti-poverty agency had previously rented the building, acted as a middleman in the transaction.

Shortly after Kaufman, Del Toro and Morales had begun negotiations concerning the lease and the possibility of paying a bribe was first discussed, Morales was arrested on September 1, 1972 by the United States Attorney's Office on unrelated bribery-conspiracy charges concerning a Model Cities summer camp program. Morales admitted his complicity, along with that of his superior John Sanders, in a series of bribery situations involving Model Cities camp programs and building rentals, and agreed to assist the Government in a joint federal-city undercover investigation into official corruption in the Model Cities Administration. Thereafter, Morales, while retaining his position at Model Cities, aided the Government by tape recording conversations with various individuals suspected of having had illicit dealings with Model Cities who, unaware of Morales' arrest, continued to perceive him as a corrupt administrator. Among those individuals were not only Del Toro and Kaufman, but Loschiavo as well.

Eventually, after a lengthy series of recorded meetings, Kaufman and Ruocco, on behalf of his employer, the building owner, signed a commission agreement which included an inflated commission percentage for Kaufman, out of which he would make payments to Morales. Subsequently, Ruocco gave Kaufman a check for \$500 to give to Morales as "front money." Kaufman then paid the \$500 in cash to Morales and urged him to press forward with arrangements for the lease.

This Court, per Gurfein, J., Judges Friendly and Feinberg joining in the opinion, although affirming de-

fendants' convictions for conspiracy to defraud and perjury, reversed the convictions of Del Toro and Kaufman on the substantive bribery counts, holding that the person bribed, to wit, Morales, was an employee of New York City and not a federal "public official" within the meaning of Section 201.

The earlier *Loschiavo* case presents a strikingly similar fact pattern to that of *Del Toro* and yet, on the critical "public official" question, reached, at least impliedly, a contrary result.

In *Loschiavo*, the Government established that the defendant paid \$20,000 in bribes to three officials of the Model Cities Administration in order to obtain from Model Cities a very lucrative lease for a building that he owned. Coincidentally, one of the three officials bribed was none other than Pedro Morales. The other two individuals to whom Loschiavo paid the bribes were Morales' superior, John Sanders, Acting Director of the Harlem-East Harlem Model Cities Program, and Kingdon DeWitt, another Model Cities employee whose position was somewhat lower than Morales' in the agency's administrative hierarchy. Loschiavo actually paid a total of \$15,000 to Sanders and Morales, \$7,500 as "front money" before the lease was approved (\$5,000 of which was paid through an intermediary, co-defendant Andrew Storms, a contractor who would do the renovations if Loschiavo's building was rented by Model Cities) and \$7,500 after the lease, which provided for a five year term of \$108,400 per year, was finally executed on May 9, 1972. Many months later, following Morales' arrest and decision to cooperate, he tape recorded a conversation with Loschiavo, in which the defendant recalled the chronology of his bribe payments to Morales and also acknowledged paying an additional \$5,000 to DeWitt because he wanted "everybody to be happy."

Perhaps significantly, and unlike *Del Toro*, Loschiavo made the bribe payments in question *before* the time Morales decided to cooperate with the Government. More importantly, and again unlike the situation in *Del Toro*, the appropriate city agencies and the United States Department of Housing and Urban Development (HUD) in fact approved the lease in question, and federal funds were actually committed to, and expended for, the rental of Loschiavo's building.

At trial Loschiavo, after first contesting the issue, ultimately conceded that Morales and Sanders were federal officials, and the court charged the jury, without objection, that Sanders and Morales were public officials of the United States acting in their official capacities in connection with the subject lease. On appeal, Loschiavo argued that there was no basis for prosecution under a federal statute because the lease was executed, and the rent paid, by the City of New York and HUD therefore was not directly affected by the bribes paid. As noted above, this Court, per Judges Moore, Mansfield and Oakes, affirmed Loschiavo's bribery conviction—the only count on which he had been convicted—without opinion. 493 F.2d 1399 (1974). In his petition for *certiorari*, Loschiavo explicitly raised the once conceded "public official" question, asserting that Morales and Sanders were "employees of the New York Model Cities Administration" not "agent(s) or employee(s) of the federal government" and therefore "no transaction with them could properly be regarded as coming within the scope" of 201(b)(2). The Supreme Court, obviously not so shocked by this Court's summary affirmance that it felt compelled to grant review, denied *certiorari*. 419 U.S. 872 (1974).

The foregoing proceedings on Loschiavo's direct appeal, of course, all antedated the ruling of the *Del Toro* panel on February 27, 1975. Curiously, however, despite the fact that Loschiavo and Del Toro both bribed the

same corrupt Model Cities official, the *Del Toro* opinion omitted any reference to the earlier *Loschiavo* affirmance. By virtue of the *Del Toro* panel's failure to consider the precedential effect, if any, of the *Loschiavo* case, this Court is now in the anomalous position of having approved a Section 201 conviction for bribing Morales in one case and having disapproved another such conviction on the ground that Morales was not a "public official" as defined in that statute. The Government is not unaware of the generally limited precedential effect attaching to summary affirmances without opinion, as in the *Loschiavo* case. Rule 50.23, Rules of the United States Court of Appeals for the Second Circuit. The prohibition of Rule 50.23, however, only applies by its terms to "unrelated cases", and it is submitted that where, as here, *Loschiavo* was convicted of bribing the very same individual now declared by *Del Toro* no longer to be a "public official", *Loschiavo* cannot reasonably be considered an "unrelated" case devoid of any precedential significance. Accordingly, the Government respectfully submits that an in banc hearing is required to resolve the arguably conflicting decisions of the *Loschiavo* and *Del Toro* panels of this Court.

Beyond this apparent internal conflict on the "public official" question, however, is the larger issue as to the ultimate soundness of *Del Toro*'s narrow construction of the federal bribery statute. In *Del Toro*, the Court, noting "the enormous amount of funding by the Federal Government on a broad spectrum which includes welfare, housing and health," evidently determined that "an expansive interpretation of the statute 'would alter sensitive federal-state relationships [and] could overextend limited federal police resources.'" * 513 F.2d at 662. On

* Of course, the altering of the same "federal state relationships" and the use of the same "limited federal police resources" were in effect specifically approved by *Del Toro* in affirming defendants' convictions for conspiracy to defraud the United States. The net result, therefore, is only to deprive the Government of the effective use of the very important bribery statute.

the contrary, we believe that an expansive reading of the bribery statute is precisely what is mandated by the clear language of Section 201(a) itself, prior decisions of this and other courts, and the unequivocal legislative purpose of the statute. Moreover, the Court's holding in *Del Toro* represents a serious constraint on federal criminal jurisdiction in an area of substantial federal concern and will undoubtedly create a severe impediment to the honest administration of the vast and increasing number of state-federal programs. Obviously, federal grants-in-aid have and will become an increasingly significant factor in our federalism. Graves, American Intergovernmental Relations, "*The Grant-in-Aid System: Developments since World War II*," pp. 568-571. Given this increasing fiscal dependency of the states and local municipalities on federal funds, we believe that it is necessarily and properly in the federal interest to assert criminal jurisdiction over those who corrupt the administration of federal funds. The ultimate effect of *Del Toro* is to place the Federal Government in the untenable position—without foundation in either the legislative history of the bribery state or in prior decisional law—of having ultimate responsibility for the functioning of federally funded and supervised programs without the hitherto concomitant authority to guarantee the programs' integrity by prosecuting the corruptors and the corrupted. For this reason as well, the Government respectfully submits that this question of exceptional importance should be resolved by the full court.

Of course, should this Court agree with the Government's position, discussed in Point I *infra*, that Loschiavo is not entitled to collateral relief under 28 U.S.C. § 2255, it would not reach the merits of the "public official" question and in banc consideration would accordingly be unnecessary.

ARGUMENT

POINT I

Loschiavo's Claim May Not Properly Be Considered In A 2255 Proceeding.

The order of the District Court vacating Loschiavo's conviction should be reversed and Loschiavo's 2255 petition dismissed without reaching the merits.* Loschiavo claims that the court that tried him misconstrued the statute he was convicted of violating. Claims of statutory construction, however, may not be raised in a 2255 motion except in exceptional circumstances not present here. Loschiavo is barred from pursuing his claim for the additional reason that he deliberately by-passed this claim at his trial and on appeal.

Relying on *United States v. Del Toro, supra*, Loschiavo contends that Pedro Morales, the man whom Loschiavo was convicted of bribing, is not a public official and that

* As a preliminary matter Loschiavo would appear to be barred from proceeding under 28 U.S.C. § 2255 because that statute in its terms is limited to a "prisoner in custody." Loschiavo has served his sentence and his parole period. He probably does not come within the broad definition of custody expressed in *Hensley v. Municipal Court*, 411 U.S. 345 (1973) or in *Jones v. Cunningham*, 371 U.S. 236 (1963). If the petition were dismissed on this basis, Loschiavo could simply proceed anew in a *coram nobis* proceeding. Forcing him to do so, however, would seem to be a futile gesture in view of the statement in *United States v. Travers*, 514 F.2d 1171, 1173 n. 1 (2d Cir. 1974), that the standards for 2255 and for *coram nobis* are similar. But see *United States v. Morgan*, 346 U.S. 502, 511 (1954); *United States v. Hayman*, 342 U.S. 205 (1952); *United States v. Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963) where the Court held that "the extraordinary" remedy of *coram nobis* is available "only under circumstances compelling such action to achieve justice."

Loschiavo therefore cannot be guilty of violating 18 U.S.C. § 201(b). Even if we assume that *Del Toro* was correctly decided, Loschiavo's argument cannot properly be made in a collateral attack on his conviction.

This argument is based solely on the interpretation of a federal criminal statute, 18 U.S.C. § 201. Post-conviction relief, however, is limited to questions arising under the laws of the United States where the law involved has changed following the petitioner's trial and appeal. The interpretation of § 201 as it pertains to Loschiavo, therefore, is not a proper question for a 2255 proceeding.

Originally *habeas corpus* relief was limited to a determination of the competency of the court in which the petitioner had been convicted. If the court had subject matter jurisdiction, as it clearly had here, there could be no further consideration by any other court in *habeas* proceedings. *Ex Parte Watkins*, 3 Peters (28 U.S.) 193 (1830) (Marshall, C.J.). Although *habeas* jurisdiction has been expanded, it still is not an appropriate basis for consideration of the non-constitutional claim made by Loschiavo.

A. Loschiavo's 2255 Claim is Barred Because He Deliberately By-Passed this Claim at the Trial and on Appeal.

In *Sunal v. Large*, 332 U.S. 174 (1947) the Supreme Court held that collateral relief was not available for a claim that had no constitutional foundation where the petitioners had not raised the claim on appeal. Writing for the Court, Justice Douglas said it was plain "that the trial courts erred in denying [the petitioners] the defense which they tendered." 332 U.S. at 176. Nonetheless,

the Court held that even though the law had changed after the petitioners were convicted, the interest in finality prevented consideration of the petitioners' claims in *habeas corpus* proceedings, at least as to defendants who did not appeal and "where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court." 332 U.S. at 182.

Loschiavo's failure to claim at his trial or on appeal that Morales was not a public official therefore prevents him from raising this question in a 2255 proceeding. At his trial Loschiavo at first raised the public official issue and then affirmatively abandoned it. Indeed, Judge Metzner specifically questioned Loschiavo's able trial counsel on this point prior to charging the jury (Tr. 355-356), and, although initially disputing the point, counsel later informed Judge Metzner's chambers, after discussions with his client, that Loschiavo was conceding the point. Judge Metzner so charged the jury and the defense did not object (Tr. 59 of the court's charge). Nor was the public official question specifically argued by Loschiavo on direct appeal. Rather he claimed that the court lacked jurisdiction because there was "no direct federal privity between Loschiavo's actions and the United States Government" (Loschiavo's Brief on Appeal, at 28). In effect, he argued that HUD was not directly defrauded or "affected" by the bribery scheme because the resulting lease was executed, and the rent paid, by the City of New York. Indeed, the Government's statement in its brief that "Loschiavo obviously does not dispute that Sanders and Morales were persons acting for and by authority of HUD in their official capacities in connection with the subject lease" (Government's Brief on Appeal, at 12 n.), drew no challenge in reply. Not until the filing of his petition for *certiorari* did the defendant finally challenge Morales' status as a "public official." Loschiavo's failure to pursue this issue at trial or on appeal, however, constituted a

"deliberate by-pass" of the "orderly federal procedures provided at or before trial and by way of appeal", *Kaufman v. United States*, 394 U.S. 217, 227 n. 8 (1969), and for this reason alone 2255 relief must be denied.

Indeed, Loschiavo's claim has less merit than the petition denied by Judge Weinfeld in *Williams v. United States*, 334 F. Supp. 669 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972). Williams filed a 2255 motion asking the court to vacate his narcotics conviction on the ground that his warrantless arrest was illegal and that the evidence seized during the search of his apartment and introduced at his trial was the fruit of a constitutionally impermissible search. Although the defendant originally had moved before trial to suppress certain evidence, a stipulation was entered into that the evidence in question in the 2255 petition had been seized incidental to the defendant's arrest. The scope of the search was also stipulated. The motion to suppress then was renewed, and it was denied. The defendant argued on appeal that the scope of the search was impermissible. Noting that the validity of the arrest was not specifically argued on appeal, Judge Weinfeld held, in circumstances strikingly similar to those present in Loschiavo's case, that Williams could not contest in a collateral proceeding what he had failed to raise on appeal:

"It is hornbook law by now that a section 2255 motion may not be used to relitigate matters not only decided, but which could have been presented, on direct appeal, nor may the section be applied in a collateral attack based upon a fragmentized claim which petitioner raised in a slightly different fashion at his trial and upon appeal.

"Even were it assumed that the issue of invalid search and seizure incident to an allegedly unlawful arrest was not raised upon direct appeal (and

this is not altogether clear), petitioner here 'deliberately by-passed' normal appellate procedures and is foreclosed at this late date from raising the claim, the facts of which were known to him from the time of his arrest and to his counsel both at trial and upon appeal. Petitioner has failed to set forth any reason why, with knowledge of all the basic facts upon which his present claim of constitutional infirmity rests, the claim was not advanced upon direct appeal, particularly since the prosecutor's statement upon appeal that the 'warrantless arrest whose validity is not contested' was not challenged." 334 F. Supp. at 671 [footnotes omitted].

When Williams appealed to the Second Circuit, the Court affirmed Judge Weinfeld's decision and adopted his reasoning, concluding that:

"The only conclusion that can be drawn from all of this . . . is that there was a deliberate by-passing of the orderly federal procedures provided at or before trial and by way of appeal. Hence, it is within the exception set forth in *Kaufman v. United States*, 394 U.S. 217, 227, 89 S.Ct. 1068, 22 L.Ed.2d 227 n.8 (1969) and Judge Weinfeld was fully justified in denying the petition." 463 F.2d at 1184.

The greatest difference between Loschiavo's petition and that presented by Williams is that Williams complained about a constitutional deprivation while Loschiavo complains only that the court misconstrued a statute. In view of his failure to raise this issue at trial or on appeal, Loschiavo's belated petition must be denied.

Another case that mandates denial of Loschiavo's claim is *United States v. West*, 494 F.2d 1314 (2d Cir.), cert.

denied, 419 U.S. 899 (1974) where the petitioner, like Williams, raised a claim in his 2255 petition that evidence introduced at his trial was the product of illegal eavesdropping.* The first time West raised the issue presented in his 2255 motion was in his petition for certiorari after his conviction had been affirmed. This is just what Loschiavo did. In *West* the Second Circuit held that there was no need to reach the merits of the 2255 petition because the issue presented had been "deliberately by-passed" at trial.**

B. Loschiavo's Petition Must Be Dismissed Because There Has Been No New Law.

Even if this Court were to conclude that Loschiavo's claim is not barred by his deliberate by-pass of the appropriate recourse at trial and on appeal, his 2255 petition must be rejected because of its failure to meet the standards expressed in *Davis v. United States*, 417 U.S. 333 (1974). First of all Davis reaffirmed the deliberate by-pass holding of *Sunal*. 417 U.S. at 345. Secondly, *Davis* reaffirmed the traditional restrictions of habeas relief to constitutional and jurisdictional claims as expressed in *Hill v. United States*, 368 U.S. 424, 428 (1962).

* *West* recently was reaffirmed in *Natarelli v. United States*, 516 F.2d 149 (2d Cir. 1975).

** Relief under § 2255 also was denied due to a failure to raise the issues in question on appeal in *United States v. Coke*, 404 F.2d 836 (2d Cir. 1968) and in *United States v. Sobell*, 314 F.2d 314 (2d Cir.), cert. denied, 374 U.S. 857 (1963). See also, *United States v. Davis*, 417 U.S. 333, 345-346 (1974); *United States v. Travers*, 514 F.2d 1171, 1176 (2d Cir. 1974) where Judge Friendly recently suggested that the Government would prevail when the petitioner had by-passed his appellate remedy, as Loschiavo has:

"Where *Sunal* may assist the Government is in limiting collateral attack on the basis of *Maze* to defendants who, like Travers, fully pursued their appellate remedies."

Davis then said that where 2255 relief is not barred by the principles expressed in *Sunal* and in *Hill*, consideration may be given a non-constitutional claim raised in a 2255 proceeding only (1) if the law has changed after the petitioner's conviction and appeal and (2) if the conviction contains "a fundamental defect which inherently results in a complete miscarriage of justice" or arises from "an omission inconsistent with the rudimentary demands of fair procedure." * *Loschiavo's* claim meets neither standard, and therefore must be rejected.

Under the first standard there can be no 2255 relief for a non-constitutional claim unless there is "new law", that is, a change in the law subsequent to the petitioner's conviction and appeal. The only basis for a claim that there is "new law" bearing on the question whether *Morales* was a public official is the decision of a panel of the Second Circuit in *United States v. Del Toro, supra.* ** *Del Toro* and his co-defendant *Kaufman* were convicted of bribing *Pedro Morales*, one of the same men *Loschiavo* bribed. The Court held that the evidence in the *Del Toro* trial was insufficient to establish that *Morales* was a public official as that term is defined in 18 U.S.C. § 201(a).

Del Toro, however, is not the sort of new law *Davis* required as a predicate for 2255 consideration of a non-constitutional claim. *Davis* had been convicted for failure to report for induction after the draft board had declared him a delinquent. After *Davis* was convicted, the Supreme Court held invalid the Selective Service delin-

* These standards were articulated in *Hill v. United States*, 368 U.S. 424, 428 (1962) and reaffirmed in *Davis v. United States*, 417 U.S. 333, 346 (1974).

** *Loschiavo's* position depends of course on the assumption that *Del Toro* should be applied retroactively. As the Government views this case, the Court need not reach that question.

quency regulations. *Gutknecht v. United States*, 396 U.S. 295 (1970). After one panel of the Ninth Circuit had affirmed Davis' conviction, *United States v. Davis*, 447 F.2d 1376 (1971), another panel reversed a conviction based on very similar facts. *United States v. Fox*, 454 F.2d 593 (1971). Davis' petition for certiorari was denied. 405 U.S. 933 (1972). Davis then brought a 2255 petition. Relief was denied by the District Court and by the Ninth Circuit without reaching the merits. 472 F.2d 596 (1972). The Supreme Court reversed and remanded, holding that Davis' petition should be considered on its merits because there had been a change in the law after he had been convicted.*

The law affecting Davis' conviction had been changed by the Supreme Court's decision in *Gutknecht*. The Supreme Court has not changed the law under which Loschiavo was convicted, and without this change in the law his 2255 petition must be rejected without reaching the merits.

This conclusion is reinforced by the Second Circuit's decision in *Travers v. United States*, 514 F.2d 1171 (1974), where the Court granted Travers' 2255 petition. Travers had been convicted of mail fraud and conspiracy to engage in mail fraud. 18 U.S.C. §§ 1341, 1342 and 371. His conviction was affirmed on appeal. *United States v. Kellerman*, 431 F.2d 319 (2d Cir.), *cert. denied*, 400 U.S. 957 (1970). The Supreme Court later held under similar circumstances that the use of the mail to collect for goods or services already obtained by use of counterfeit credit cards was not sufficiently related to the scheme to defraud

* The Supreme Court in *Davis* expressly refused to decide whether *Gutknecht* should be applied retroactively or whether *Fox* was correctly decided. 417 U.S. at 341 n. 12.

within the meaning of the mail fraud statutes. *United States v. Maze*, 414 U.S. 395 (1974).

Relying on *Davis*, the Second Circuit held in *Travers* that the change in the law effected by the Supreme Court's decision in *Maze* was a sufficient basis for 2255 relief.

A material difference between *Davis* and *Travers* and the claim Loschiavo now raises is that *Davis* and *Travers* were both based on new law established by Supreme Court decisions. The decision of a panel of the Second Circuit in *Del Toro* cannot be considered new law sufficient to merit 2255 consideration for Loschiavo. The Court in *Del Toro* did not refer to the earlier affirmance of Loschiavo's conviction by another panel of the Court, nor did it purport to establish new law. Most importantly, Judge Friendly, writing in *Travers*, expressed his understanding that a decision of a panel of one circuit of the Court of Appeals does not establish "new law."

"The Government urges in effect that *Maze* was indeed an overruling decision in that it changed 'the law of the circuit'—indeed of several. But reliance on the quoted expression, of rather recent vintage, which is only a short-hand way of saying that the view of a court of appeals on an issue of federal law may remain undisturbed for a long time, can lead to dangerously wrong results. There are not eleven omnipresences of federal law brooding over various portions of the United States; in the long run there is only one, although some time may be needed to reveal it." 514 F.2d at 1174 n.4.

See also *Davis v. United States*, *supra*, 417 U.S. at 360 (dissenting opinion of Justice Rehnquist) ("I cannot see why a decision by a single panel of the Court of Appeals

for the Ninth Circuit should be considered a 'law' of the United States.") *

In *Sunal v. Large*, *supra*, 332 U.S. at 181, Justice Douglas relied on the fact that that case, like Loschiavo's, was "not one where the law was changed after the time for appeal had expired. Cf. *Warring v. Colpoys*, 122 F.2d 642." In *Sunal* the petitioners claimed that their failure to appeal was excusable because that route had seemed futile. They argued that until the Supreme Court decisions in *Estep v. United States* and *Smith v. United States*, 327 U.S. 114 (1946), the point they were relying on always had been rejected. They suggested that *Estep* and *Smith* established new law excusing their failure to appeal. Justice Douglas made it clear in *Sunal* that *Estep* and *Smith* did not change the law. This is the sort of situation, he wrote, "where at the time of the convictions the definitive ruling on the question of law had not crystallized." 332 U.S. at 181 (emphasis added). Similarly, the definitive definition of a public official under 18 U.S.C. § 201(a) had not crystallized at the time of Loschiavo's trial and appeal, as indeed it has not to this date. The Supreme Court has not spoken in this area. Loschiavo's failure to raise this question at trial and on appeal cannot be excused, and he cannot rely on *Del Toro*,

* While we recognize that Justice Rehnquist, in his lone dissent in *Davis*, broadly read the majority's opinion to treat the Ninth Circuit's decision in *Fox*, and not *Gutknecht*, as the relevant "new law", *United States v. Davis*, *supra*, 417 U.S. at 360, it is well to heed Judge Friendly's admonition in *Travers* that "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." 514 F.2d at 1174. In any event, the majority itself indicated that *Davis*' contention was based on "the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case", 417 U.S. at 346, and Loschiavo can in no way contend that *Del Toro* was similarly interpreting and applying a definitive ruling of the Supreme Court.

a decision of one panel of the Court of Appeals, as the sort of new law on which to predicate a § 2255 motion. Justice Douglas articulated the joint interests in pursuing the proper judicial procedure and in finality in criminal litigation that underlie this conclusion:

"We are dealing here with a problem which has radiations far beyond the present cases. The courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. Cf. *Warring v. Colpoys*, *supra*. If in such circumstances, *habeas corpus* could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitu-

tional rights of defendants nor involve the jurisdiction of the trial court." *Sunal v. Large, supra*, 332 U.S. at 181-182.

The judicial "horrors" attendant upon allowing previously convicted defendants collateral relief each time a circuit court, or indeed, a single panel of an individual circuit, newly announces or later revises its interpretation of a particular statute were vividly forecast by Justice Rehnquist in his dissent in *Davis*, 417 U.S. at 361:

"The Court gives no indication of where this loose process of definition will end. It would certainly be surprising if a decision of the Court of Appeals for the Fourth Circuit, for example, were sufficient to give prisoners in the Ninth Circuit grounds for a § 2255 motion, but it is not clear to me why a decision of the Fourth Circuit is any less a law of the United States than a decision of the Ninth Circuit. Concededly, it need not be considered binding on the Ninth Circuit, but that is not the concern under § 2255. Nor is it obvious to me what the Court would require a Court of Appeals to do when intracircuit conflicts arise."

Inasmuch as *Del Toro* does not constitute "new law" within the meaning of the *Davis* and *Sunal* decisions, Loschiavo's 2255 petition must be denied for this reason as well.

C. 2255 Relief is Available for Nonconstitutional Claims only Where There is "a Complete Mis-carriage of Justice."

In each of the cases where a nonconstitutional claim has been considered in a post conviction proceeding, the court has said relief can be granted only for "a complete

miscarriage of justice." *Davis v. United States*, *supra*, 417 U.S. at 346; *Hill v. United States*, *supra*, 368 U.S. at 428; *United States v. Travers*, *supra*, 514 F.2d at 1178. There has been no miscarriage of justice with regard to Loschiavo. Loschiavo was convicted of, and, indeed, at trial admitted bribing Pedro Morales, an official of the Model Cities program. Even if *Del Toro* correctly decided that Morales is not a public official under 18 U.S.C. § 201, it cannot be said that Loschiavo's conviction resulted in "a complete miscarriage of justice." Although Loschiavo may claim that his conviction might have been reversed *if* he had claimed on appeal that Morales was not a public official and *if* the panel that sat in *Del Toro* had reviewed his conviction, that provides no basis for establishing the gross miscarriage of justice required to justify collateral relief.

In *Davis*, petitioner claimed that he had been convicted for failing to report for induction under an induction order arguably invalid under *Gutknecht*. The Court reasoned that if this contention was correct, Davis had been convicted "for an act that the law does not make criminal" and that such a circumstance would inherently result "in a complete miscarriage of justice" warranting collateral relief. Obviously, if Davis' interpretation of *Gutknecht* was sound, he had committed no crime punishable in any court for there was simply no crime for him to commit. Loschiavo, on the other hand, can hardly contend that he committed no unlawful conduct. As the *Del Toro* court emphasized, the bribery of Morales was "clearly illegal conduct under state law," 513 F.2d at 662, even if Morales could not be deemed a federal public official. Loschiavo has already completed service of his sentence for engaging in what was unquestionably criminal conduct—if not under federal law, then certainly under state law. This is not a case like *Davis* involving "continued incarceration after a change in the judicial

interpretation of a statute makes the punished conduct *free from sanctions*." Note, the Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 218 (1974) (footnote omitted) (emphasis added). Loschiavo is no longer in jail, and the conduct for which he was punished was certainly not "free from sanctions", at least under state law. While Davis presents a case of a conviction for conduct that no law makes criminal, Loschiavo asserts at this late date only that his acts—although clearly criminal under state law—were not punishable under federal law. Such a claim does not rise to the level of "exceptional circumstances", *Davis v. United States*, *supra*, 417 U.S. at 346-347, necessary to warrant collateral relief under § 2255.*

Loschiavo's 2255 petition should be rejected on its face as an attempt to attack a conviction collaterally based on nonconstitutional issues that should have been

* In an analogous situation, the Supreme Court, in *Gosa v. Mayden*, 413 U.S. 665 (1973), declined to accord retroactivity to *O'Callahan v. Parker*, 395 U.S. 258 (1969), which held that a serviceman charged with a crime not "service connected" is entitled to indictment and trial by jury in a civilian court. Reasoning that the conduct in question was not "constitutionally immune from punishment" in *any* court, *Gosa v. Mayden*, *supra*, 413 U.S. at 677 (emphasis added), the Court stated: "The question was not whether O'Callahan could have been prosecuted; it was, instead, one related to the forum." *Id.*

While we recognize that *United States v. Travers*, *supra*, 514 F.2d at 1176-1179, at least impliedly, reached a contrary result on this issue, we respectfully submit that *Travers* unduly extended the "miscarriage of justice" finding in *Davis* to defendants whose acts, although criminal, were prosecuted in the wrong forum. *Davis*, we submit, found such a miscarriage to exist only as to those defendants whose acts were not made criminal by *any* law. Accordingly, we would ask the Court to reconsider the holding of *Travers* on this issue should the Court find the Government's arguments on "deliberate by-pass" and "new law", discussed *supra*, unavailing.

raised at the trial and on appeal. There has been no "new law" subsequent to Loschiavo's conviction on which a 2255 petition properly can be based. Nor can Loschiavo's conviction be deemed "a complete miscarriage of justice." There is no basis for considering Loschiavo's claim on the merits. The order of the District Court should be reversed, and Loschiavo's application for 2255 relief should be denied.

POINT II

The District Court Erred In Vacating Loschiavo's Bribery Conviction. In View Of The Pervasive Involvement Of The Federal Government In The Funding And Supervision Of The Model Cities Program, The Legislative Intent Of The Bribery Statute, And Prior Case Law, Del Toro Was Incorrectly Decided And Pedro Morales Should Be Deemed A "Public Official" Within The Meaning Of Section 201.

Abundant evidence of the Federal Government's financial and supervisory interest in the Model Cities Program was introduced at both the *Loschiavo* and *Del Toro* trials and makes clear that Pedro Morales was a "public official" within the meaning of the federal bribery statute.

Congress enacted the Model Cities legislation in 1966 as the "Demonstration Cities and Metropolitan Development Act of 1966", 42 U.S.C. § 3301 *et seq.* It was intended as a comprehensive approach for dealing with urban problems on a national scale and provided for federal funds to be distributed in massive amounts to qualified cities to improve the quality of life within a defined neighborhood or neighborhoods in the particular city. The legislation required that the federal monies

be used only for certain designated purposes in accordance with a highly particularized budget approved by HUD. Under the Act, Congress vested HUD with supervisory responsibility for administering the Model Cities Program in New York and in some 74 other cities. New York City entered the Program under a \$65 million dollar grant agreement with HUD on June 27, 1969, an agreement which, in amended form, continued throughout the relevant period of this indictment (Tr. 188-193).

To insure that the expenditure of this substantial amount of federal money served the purposes prescribed by Congress, HUD's contract with the City obligated New York (1) "to carry out the Program . . . in accordance with the policies, procedures and requirements . . . prescribed by HUD", (2) to use grant funds "only for those costs which the Government determines to be applicable to this Agreement", and (3) to "deposit all Grant funds in a depository acceptable to HUD" (GX 6). In practice, HUD's funding of New York's Model Cities Program was accomplished by means of letters of credit deposited in certain designated banks. Furthermore, the City was required to maintain records in compliance with HUD's record keeping requirements concerning all matters covered by the grant agreement; to document all costs of the program and keep such documentation readily accessible to HUD; to submit to regular audit and permit inspection by HUD of all its records relating to the program, including contracts, invoices, payrolls and personnel records; and to comply with HUD's guidelines concerning, *inter alia*, conflicts of interest, discrimination in employment and labor standards (GX 6).

Frank Torres, the HUD official responsible for the New York City Model Cities Program, further testified that his department made regular visits not only to Model Cities administrative offices but also to various

project sites, and required the City to submit quarterly reports on the progress of individual projects and monthly fiscal statements itemizing the disbursement and flow of federal monies (Tr. 196). In addition, HUD issued guidelines to local Model Cities offices concerning management capability of its employees, required the City to give preference in hiring to area residents and to maintain a certain level of competence amongst Model Cities employees, and reserved the right to review the hiring of any individual and to comment on his performance (Tr. 205, 207).^{*} HUD, also, retained the right at any time to suspend or terminate payment of funds for non-compliance with the terms of the agreement or otherwise improper use of grant funds, for example, if employees were engaged in conflicts of interests (Tr. 196-197).

For its part, the Federal Government agreed to pay 100% of the costs of all approved projects and activities of the program, such as the sanitation project relevant to this case, and 80% of the costs of administering the program, including the salaries of Administrator Sanders and Assistant Administrator Morales (Tr. 194-195). Thus, with reference to the sanitation facility housed in Loschiavo's building, HUD specifically authorized an expenditure of federal funds (\$852,600) to cover the total cost of a Neighborhood Cleanup Program in the Harlem-East Harlem Model Cities area, *including* the rental of a sanitation facility, which the City arranged to operate

^{*} Testifying at the subsequent *Del Toro* trial, Torres further emphasized that if the City proposed to do "different things" once the program for the year had been established, the City had to obtain permission from HUD (Tr. 424), and that "if (a particular project) involved the use of Model Cities money or the use of the personnel which is paid for with that money, we (HUD) would have had to have been involved" (Tr. 432-433).

through its Department of Sanitation, under HUD's guidelines concerning record keeping, documentation of costs, audits and inspection, conflict of interest, and others. Pursuant to this arrangement, HUD funded 100% of the rental due to Loschiavo for his building (Tr. 197-203; GXs 7, 8 and 9). Furthermore, as noted above, HUD paid 80% of the salaries of the Model Cities officials whom Loschiavo bribed to obtain his lease with the City, namely, Sanders and Morales.

Morales, as Assistant Administrator of Harlem-East Harlem Model Cities, earned \$17,500 per year and obviously occupied a highly responsible position within the Model Cities Program in New York.* Every project he approved or recommended was, necessarily, paid for exclusively by the Federal Government. His duties, as noted above, were carefully circumscribed and defined by the policies, procedures and requirements prescribed by HUD. Indeed, HUD imposed on Morales and other Model Cities officials conflict of interest provisions which specifically prohibited them from receiving, directly or indirectly, "any share or part of this Agreement or . . . any benefit to arise from the same," and from acquiring "any personal interest in any property, contract, or proposed contract which would conflict with the performance of his duties or responsibilities under this Agreement" (GX 13).**

Thus, while it may be true that Morales was technically employed by the City of New York, the pervasive control and supervision exercised by HUD over the City's Model Cities Administration were such that Morales

* Torres testified at the *Del Toro* trial that Morales was "two down from the (top) administrator" in the administrative hierarchy of the New York City Model Cities Program (Tr. 440-441).

** Surely if HUD imposed conflict of interest prohibitions on Morales, it must have expected that under already existing federal criminal provisions Morales would have been barred from soliciting and receiving bribes as well.

should properly and reasonably be regarded as a "person acting for or on behalf of the United States . . . in (an) official function, under or by authority of (a) department" of the Federal Government. The overwhelming evidence, summarized above, of the federal interest in the Model Cities Program and its employees clearly brings Morales within the language and intent of the bribery statute as well as prior case law interpreting Section 201.

A. Prior Decisions

The Government submits that the *Del Toro* panel, perhaps in straining to reach a result it favored on public policy grounds, has rendered a decision which can only be reconciled with pre-existing decisional law in the bribery area in terms of a change in policy predilection, for pertinent authority not only fails to support *Del Toro's* holding, but in fact seems to require the opposite result—i.e., that Morales was a public official as defined in 18 U.S.C. § 201(a).

Although, admittedly, there is not a substantial amount of case law in this area and no other courts to date have had occasion to consider whether "city" employees precisely in Morales' position may be considered federal public officials for purposes of the bribery statute, several prior decisions, including two leading cases in this Circuit, would appear indistinguishable in principle from the instant case.

Indeed, in some respects, *United States v. Levine*, 129 F.2d 745 (2d Cir. 1942), which the *Del Toro* panel dismissed as "inapposite", presented a much less persuasive case for the assertion of federal bribery jurisdiction than does either *Loschiavo* or *Del Toro*. In *Levine*, this Court

held that an employee of the Market Administrator for the New York Metropolitan Milk Marketing Area was a "public official" within the meaning of the federal bribery statute. Although the Market Administrator himself was appointed by the Secretary of Agriculture, his employee, the defendant Levine, was neither appointed by the Secretary nor even paid with federal funds. Rather he was paid for his services by funds taxed directly to the milk handlers in the area. Even more significantly, *Levine* makes it clear that although the Market Administrator may also have been an agent of New York State, "that did not make him or his employees *in their federal capacity* any less subject to the criminal provisions regulating the conduct of persons acting on behalf of the United States." *Id.* at 748 (emphasis added). Indeed, *Levine* held that a prior state conviction for the same bribery would not have barred the federal bribery prosecution. Likewise, we submit, Morales should not be exempted from *federal* public official status simply because he, too, may have worn "two hats"—one federal and one local—in his capacity as Deputy Director of Model Cities.

Further evidence of the breadth courts have read into Section 201 is found in *Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962). There, employees of the "European Exchange System" (a system established to operate and maintain various merchandising facilities catering to military service members, dependents and certain employees of military departments) were convicted of soliciting and receiving bribes. They claimed on appeal that as EES employees they were not persons "acting for or on behalf of the United States" within the meaning of the bribery statute. Indeed, their contention was bolstered by the fact that their employment contracts specifically stated that an EES employee was "not considered to be a Federal employee" and that EES was what is known as a non-appropriated fund activity, employees of which

were, by statute, not "considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees Compensation Act." Despite these indicia of the employees' federal non-involvement, the Fifth Circuit had no problem in holding that these individuals were persons acting for or on behalf of the United States.

Similarly, because of the sweeping language of the statute and the broad protective purpose it was designed to accomplish, the court in *United States v. Raff*, 161 F. Supp. 276, 278-279 (M.D. Pa. 1958) had no hesitation in concluding that a partner in a private architectural and engineering firm under contract with the Department of the Army was a person acting for or on behalf of the Federal Government. See also *United States v. Laurelli*, 187 F. Supp. 30, 32-34 (M.D. Pa. 1960).

Furthermore, by way of analogy, it has long been recognized both by this Court and the Supreme Court that federal fraud statutes are applicable to local activities funded by the Federal Government. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), like the instant case, involved a federally funded program administered by local officials under the direction of the Public Works Administration. There, the defendant electrical contractors, who were charged with making false claims for payment against the Federal Government, had, by means of a collusive bidding arrangement, entered into inflated contracts with local governments in projects funded by the Public Works Administration. As the Supreme Court said, "(A) large portion of the money paid the respondents under these contracts was federal in origin, granted by the federal Public Works Administrator, an official of the United States. . . ." 317 U.S. at 542-543. In these circumstances, the Court held that the

defendants had made false claims against the United States. By a parity of reasoning, the local officials who dispensed the federal funds in *Marcus* were acting "for or on behalf of" the United States.

More recently, in *United States v. Candella*, 487 F.2d 1223 (2d Cir. 1973), *cert. denied*, 415 U.S. 977 (1974), a case involving the Slum Clearance and Urban Renewal Program Act, 42 U.S.C. § 1450 *et seq.*, a legislative scheme closely paralleling that of the Model Cities Act, this Court concluded that 18 U.S.C. § 1001, which forbids the making of false statements "in a matter within the jurisdiction of any department or agency of the United States . . .," was applicable to false claims for moving expenses under an urban renewal project because, although the claims were presented to the New York City government, the City received reimbursement from the Federal Government, specifically, HUD. In affirming the convictions of the moving company owners who had submitted false bills of lading and affidavits to the City, executed on forms prepared by the City and not by HUD, the Court stated:

"The jurisdiction of HUD is clear. The City entered contracts with the United States on specific urban renewal projects including those which prompted the moving here. The United States became ultimately responsible for paying 100% of the moving expenses incurred by the four concerns involved." 487 F.2d at 1226.

Surely if the false claims submitted to the City here may be considered "within the jurisdiction" of HUD under 18 U.S.C. § 1001, Pedro Morales, as an Assistant Administrator of Model Cities, should be found to have been acting "under or by authority" of that same federal department for purposes of Section 201.

The Court in *Del Toro* attempted to distinguish *Marcus* and *Candella* as "different" purportedly because they "involved obtaining federal funds by fraudulent means, . . . , a direct injury to the federal government." 513 F.2d at 662 (emphasis in original). As has just been pointed out, however, *Marcus* and *Candella* involved federal funding programs substantially identical to that existing in Model Cities. Moreover, while it may be technically true that the money used to pay 100% of the program cost and 80% of administrators' salaries in the Model Cities Program in New York City came from grants made by HUD to the City, it would be an elevation of form over substance to say that these were "municipal" funds because they were transmitted to the City through the medium of a grant. The language of the Supreme Court in *Marcus* is dispositive on this point:

"Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. . . . These funds are as much in need of protection from fraudulent claims as any other federal money, and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. . . . The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary." 317 U.S. at 544.

Federal courts have for many years confronted the problem of determining when people have acted for or on behalf of the United States. Although each of the previously decided bribery cases is distinguishable from the precise facts of the instant case, it would appear that courts have almost invariably, in keeping with acknowledged legislative intent, resolved doubts in favor of an expansive reading of the pertinent statutory language. In *Kemler v.*

United States, 133 F.2d 235 (1st Cir. 1942), a physician chosen to examine registrants for selective service was held subject to the federal bribery statute. Similarly, in *Sears v. United States*, 264 F.2d 257 (1st Cir. 1920), inspectors in a plant manufacturing shoes for the army were found to be within the statutory purview, as was an Indian agency clerk in *Whitney v. United States*, 99 F.2d 327 (10th Cir. 1938). The logical implications of these earlier decisions, in which persons exercising much less authority than Morales possessed were held subject to the bribery statute, would be, we submit, to accord public official status to individuals like Morales who wield such substantial authority as to affect significantly the proper administration of a federally funded and controlled program.

In *Del Toro*, the Court inquired whether Section 201 "on its face" applied to a person in Morales' status and concluded that while Morales may have been a person "acting for or on behalf of the United States in any official function," he was not acting "under or by authority of any such department, agency or branch" of the Federal Government. This finding, based primarily on the fact that "(t)here were no existing committed federal funds for the purpose", 513 F.2d at 662—i.e., for the project in regard to which Morales was bribed by Del Toro and Kaufman—and that Morales' recommendation still had to be passed upon by other city agencies before being forwarded to HUD for final approval, does not, in our view, follow either from the facts or in reason. For whether Morales or others like him is to be considered a federal public official should not depend in each case on whether or not the particular project he has recommended and for which he has been bribed has yet passed through all stages of the approval process or has yet received federal funds. To suggest that Morales' status as a public official turns on the question of whether federal funds have actually

been committed to or expended on a certain project is to ignore the Federal Government's 100% funding interest in the Model Cities Program and the fact that a recommendation by Morales would almost automatically result in an expenditure of federal funds. Indeed, *Loschiavo* may be distinguished from *Del Toro* by virtue of the fact that both the City and HUD had in fact approved the lease for Loschiavo's building, and federal funds in the amount of \$852,600 had been "committed" to the sanitation project, which specifically included the rental of Loschiavo's building. *Loschiavo*, then, involved not just prospective action which might or might not occur, as was the case in *Del Toro*, but rather a completed corrupt deal.*

In any event, the Government submits that in both *Loschiavo* and *Del Toro* Morales was at all times acting "under or by authority" of the Federal Government. Just as Levine was an employee of the Market Administrator, who, in turn, was acting under and by authority of the Secretary of Agriculture, Morales was, in the language of *Levine*, 129 F.2d at 747, a "responsible" official of the New York City Model Cities Administration, which, in turn, was acting under and by authority of, and, indeed, pursuant to an express contractual grant agreement with HUD. The Model Cities Program of which Morales was an integral part was designed, created, funded and rigorously supervised by the Federal Government. The very position Morales held, as Deputy Administrator of this multimillion dollar governmental program, was budgeted and paid for by HUD. Both Model Cities and Morales,

* It might also be noted that whereas *Del Toro* involved a bribe paid to Morales while he was acting in an undercover capacity, Loschiavo paid Morales at an earlier time when Morales was actually working, not in his dual role as an undercover agent for the United States Attorney's Office, but rather solely as a corrupt Assistant Administrator for Model Cities.

then, were the offspring, not of the City of New York, but of Congress. This was not a case of an established City agency or department simply receiving an input of federal funds for a limited purpose, but rather a federal program in origin and execution, administered and supervised jointly, as was the intent of Congress, with the local municipality. If Pedro Morales had been any more subject to HUD's authority and direction than he was, he would have ceased being a City employee altogether. At the very least, Morales must be considered a public official acting in a dual capacity: a person acting for and on behalf of both the United States and the City of New York in a program under the joint authority of both sovereignties.

The *Del Toro* decision significantly curtails the broad language of the bribery statute by excluding individuals like Morales from its coverage. The effects of this decision on federal law enforcement in general, and, specifically, on the integrity of federally funded and supervised programs administered by state and local governments (or, in some instances, by public or private non-governmental corporations) will, we believe, be both profound and sweeping despite the Court's stated intention to limit its holding to "the circumstances of this case." 513 F.2d at 663. As a result of the enormous growth in recent years of federal grant-in-aid programs, and of the local officials who administer them, federal bribery prosecutions in this area have been expanding rapidly.* The *Del Toro*

* For example, a number of indictments have been returned recently in several major cities charging Department of Housing and Urban Development Area Management Brokers, who are independent contractors, with conspiracy to defraud the United States and bribery. Similarly, the highly publicized investigation in New Orleans into widespread corruption of grain inspectors and weighers has resulted in eleven indictments and nine pleas of guilty to federal bribery charges to date. Although the grain inspectors are licensed both federally and by the State of Louisiana, they are actually employed by non-governmental private corporations such as the Greater Baton Rouge Port Commission.

decision, left undisturbed, can and will have a "chilling effect" upon this important line of cases in which federal jurisdiction is asserted to safeguard the integrity of federally funded and supervised programs and activities. In the instant case, if the effective and honest functioning of the federal statutory scheme, under the authority of which the Model Cities Program was conceived and operates, is to be assured, the sanctions of the federal bribery statute must be made applicable to those responsible officials who, by taking bribes in the course of their employment in this essentially federal program, utterly corrupt the due administration thereof. Certainly the Federal Government should not be expected to entrust the preservation of federal funds distributed under the Model Cities and other federally-controlled programs to the enforcement of local statutes by already overburdened and understaffed local law enforcement authorities. In this regard, it should be noted that Congress has previously found it necessary to pass legislation—to wit, the Travel Act, 18 U.S.C. § 1952—to permit federal authorities to assist State and local governments in uncovering and prosecuting corruption of local law enforcement itself. It is submitted, therefore, that the Federal Government must unquestionably then retain the authority to guarantee the integrity of its own federally funded and supervised programs, the efficacy of which remain *its* ultimate responsibility.

B. Legislative History

The Court in *Del Toro* felt that it would "have to strain to find a Congressional intention to include Morales" within the meaning of Section 201. 513 F.2d at 662. On the contrary, however, analysis of the legislative history of the federal bribery statute strongly suggests that Congress intended this "broad bribery statute", as it is frequently referred to in the reported cases, to encompass officials such as the Model Cities

Program's Assistant Administrator within its purview. A review of the history of the bribery and related statutes makes it clear that Section 201 was used in this case to accomplish a purpose which was very much a part of the drafters' intent.

1. *Del Toro's* Erroneous "Process Of Exclusion" Interpretation Of Legislative Intent.

Del Toro, by reference to the so-called "conflict of interest" statute, 18 U.S.C. § 203, a statute prohibiting compensation to members of Congress, officers and employees in matters affecting the Government, suggests that Congress, "by a process of exclusion," *id.*, has evidenced an intention not to include persons in positions such as Morales' within the ambit of those deemed "public officials" under Section 201. The fact that Congress, in enacting the Public Health Service Statute, 42 U.S.C. § 246(f) (7) (A), expressly made the provisions of Section 203 applicable to state officers or employees assigned to HEW without appointment, and, in formulating the 1971 Government Organization Statute, 5 U.S.C. § 3374, again explicitly applied Section 203 (and related conflict sections) to state and local government employees detailed to executive agencies, including HUD, was taken by the Court in *Del Toro* as evidence of the narrow construction to be accorded the bribery provisions of Section 201. The Court reasoned that such express references to Section 203 would be unnecessary if Congress had always intended these state and local employees to come within the umbrella of "persons acting for or on behalf of the United States." The Court, however, has mistakenly assumed that Section 203 contains the same broad language of Section 201 just quoted. On the contrary, it was apparently because Section 203 (and the other cited "conflict" sections) refer only to "officers and employees" of the United States and do not include the broader "persons" language of Section 201 that Congress, arguably, felt compelled to make explicit refer-

ence to the conflict of interest, but not to the bribery, provisions in drafting the Public Health and Government Organization statutes. Indeed, Congress' seemingly deliberate decision to omit reference to Section 201—the "pure bribery" provision—in these statutes would reasonably indicate that the legislature believed that such state and local employees were already covered by the broad definition of "public official" in Section 201, but not by the narrower provisions of Section 203 and related sections.*

The flaw in the Court's reasoning in *Del Toro* becomes even more apparent when its ultimate consequences are realized. *Del Toro* suggests that a person in Morales' position officially "detailed" to HUD pursuant to 5 U.S.C. § 3374 would be deemed a federal "employee" fully subject to the conflict of interest statutes although he could not be considered a "public official" under Section 201 in view of the absence of any specific reference thereto in the Government Organization statute. It would seem highly unlikely that Congress ever intended to define a state or local official as a federal "employee" subject to the conflict of interest statutes and yet exempt that same

* Indeed, even though Congress on occasion has, by specific reference, made Section 201 *itself* applicable to certain Acts, the omission of such a special reference in still other Acts has not prevented the courts from applying the bribery statute thereto. As this court stated in *United States v. Levine, supra*, 129 F.2d at 748:

"The mere fact that several other Acts creating different agencies of government have specifically provided that the employees of those agencies are to be subject to this criminal provision does not, of course, mean that the broad provisions of the section are not applicable to this Market Administrator and his employees."

Moreover, if Congress has gone so far as to prohibit political activity on the part of state and local employees like Morales, 5 U.S.C. § 1501, it certainly would be anomalous indeed if Congress had not intended to subject the same employees to federal provisions governing the more serious conduct of bribe receiving.

employee from the broader and more serious proscriptions of the bribery statute. Such an illogical result, namely, that an individual regarded as a federal "employee" might nevertheless not be considered a "person acting for or on behalf of the United States," finds no support in the legislative history of Chapter 11 ("Bribery, Graft, and Conflicts of Interest") of Title 18.

Indeed, the fundamental error in *Del Toro's* legislative analysis lies in its failure to recognize that Section 201 stands separate and distinct from the other provisions of Chapter 11. Whereas the present Section 201 was designed as a comprehensive bribery statute to replace earlier bribery statutes contained in former Sections 201-213 of Chapter 11, the current Sections 202-209 were intended to supplant various prior sections of Title 18 dealing with the problem of conflicts of interest. Section 201 now deals exclusively with the bribery of "public officials", the latter being "broadly defined to include officers and employees . . . and other persons carrying on activities for or on behalf of the Government." This expansive definition was adopted solely for purposes of Section 201. S. Rep. No. 2213, 87th Cong., 2d Sess., 7-8 (1962). Present Sections 202-209, on the other hand, are concerned only with conflicts of interest and were intended to "promote and balance the dual objectives of protecting government integrity and facilitating the Government's recruitment and retention of needed personnel." *Id.* at 7. This latter goal was to be accomplished "by imposing a lesser array of prohibitions on temporary and intermittent employees than on regular employees," thereby facilitating the hiring of outside experts. Letter of Attorney General Robert F. Kennedy Accompanying Memorandum Regarding Conflict of Interest Provisions of Public Law 87-849, January 28, 1963, 28 F.R. 985. The provisions of these "conflict" laws apply only to a narrow group of persons who are considered officers or employees of the

executive, legislative or judicial branch of the Government. Clearly, the broad language of Section 201, which is absent in Sections 202-209, reflects a legislative determination that the bribery statute should have a wider scope and application than the corresponding conflict of interest provisions relied on by *Del Toro*.

2. The History And Purpose Of Section 201.

The legislative history of Section 201 clearly indicates that the term "public official" was "broadly defined" and that the statute in general was intended to be a "comprehensive" one. There is no indication whatsoever of a Congressional intention to deny application of the statute to any person who might reasonably be considered to be acting for or on behalf of the Federal Government.

The Congressional hearings and reports provide conclusive evidence of the drafters' intent to impart the broadest possible reach to the bribery statute. The House Report accompanying Section 201 speaks in unequivocal language on this point:

"The bill does not limit in any way the broad interpretation that the courts have given to the bribery statutes; rather, the intent is to ensure that this broad interpretation shall be given universal application." H.R. Rep. No. 748, 87th Cong., 1st Sess., 17 (1961).

Indeed, Congress, had specifically concerned itself with the issue of whether or not to retain the expansive phrase "any person acting for or on behalf of the United States" used in the 1948 law in the definition of "public official", and affirmatively decided to do so. In fact, H.R. 3411, a previously proposed version of the

present law, contained a narrower definition of "public official" which would have omitted the "persons" category altogether. The Department of Justice opposed this early version, then Assistant Attorney General Nicholas deB. Katzenbach noting:

"(T)he definition of public official . . . does not include any reference to persons 'acting for or in behalf of the United States.' This latter phrase appears in the existing law and we think its removal would be undesirable. Under the proposed definition it could be construed that under certain circumstances, a person acting in behalf of the United States would not be held to be an 'officer, agent, or employee of the United States' as these terms are used in the bill. Persons acting in such a capacity should be protected from bribe offers (or punished for their acceptance)." Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong. 1st Sess., 36 (1961) (Analysis of H.R. 3411 by Assistant Attorney General Nicholas deB. Katzenbach).

Congress ultimately heeded the Department's objections to the earlier bill and in its stead adopted H.R. 8140, which contained the present language of Section 201. Katzenbach described H.R. 8140 as a "comprehensive statute applicable to *all persons performing activities for or on behalf of the United States*. . . . (I)t applies, most importantly, to *public officials of all kinds* and witnesses at trials, congressional hearings, and agency proceedings." Hearings on H.R. 8140 before the Senate Committee on the Judiciary, 87th Cong., 2d Sess. 22 (1962) (Statement of Deputy Attorney General Nicholas deB. Katzenbach) (emphasis added).

It is interesting to note that while the Court in *Del Toro* rejected the Government's "public official" argument

because it placed no emphasis on the modifying phrase "under or by authority of" in Section 201, Congress apparently placed very little emphasis on this language itself in drafting Section 201. The Senate Report which accompanied the bill referred only to officers, employees "and other persons carrying on activities for or on behalf of the Government," S. Rep. No. 2213, 87th Cong., 2d Sess., 7-8 (1962), and the corresponding House Report described a public official in like terms without any reference to the "under or by authority of" language relied on in *Del Toro*. H.R. Rep. No. 748, 87th Cong., 1st Sess., 15 (1961). Significantly, however, the House Report *did* refer, approvingly, to *United States v. Levine*, 129 F.2d 745 (2d Cir. 1942)—relied on here and in *Del Toro* by the Government—as an appropriate judicial construction of the "acting for or on behalf of" language of the present law. H.R. Rep. No. 748, 87th Cong., 1st Sess., 18 (1961).

A further revealing insight into the intended breadth of Section 201 may be gained by reference to its predecessor provisions in the 1948 law, 18 U.S.C. § 201 (June 25, 1948, ch. 645, 62 Stat. 691), which contained substantially identical definitional language. The 1948 law itself had amended the 1940 Code, 18 U.S.C. § 91 (Mar. 4, 1909, ch. 321, § 39, 35 Stat. 1096), by adding the words "or any department or agency thereof" after the phrase "any person acting for or on behalf of the United States" and was passed specifically to counteract the effect of an earlier Supreme Court decision, *United States v. Strang*, 254 U.S. 491 (1920), which had refused to apply the old bribery law to a person employed by a Government owned and controlled corporation. The Reviser's Notes make clear that the 1948 amendment was designed to carry out the unequivocal intent of Congress to apply the sanctions of the bribery statute to any and all persons acting on behalf of the burgeoning executive branch of Government:

"(W)hen Congress enacted this section (the bribery law) as part of the 1909 Crim. Code, the present ramifications of the executive branch were not foreseen and, consequently, the language proved inadequate to cover every new agency as indicated by the holding in the *Strang* case. Since then the growth of agencies, independent establishments, and Government-owned or controlled corporations has been *phenomenal*. It is the purpose of the inserted language to further what appeared *unquestionably* to be the intent of Congress, namely, to cover all persons acting for the United States Government in an official function." Reviser's Notes, 18 U.S.C. § 201 (1952 ed.) (emphasis added).

Thus, it would appear that Congress, having "unquestionably" asserted its intention to give the bribery statute the broadest possible reach, should not be required to graft on new language to Section 201 whenever the "phenomenal" growth of the Federal Government results in yet another new federal agency or program. The legislative history strongly suggests that Congress intended to include responsible officials like Morales, who carry on important activities on behalf of a federal agency, within the ambit of the bribery statute. Certainly there is nothing to indicate that Congress intended to exclude such individuals. *Del Toro's* suggestion of a "contrary Congressional intent", 513 F.2d at 663, with regard to including persons like Morales within Section 201 is simply without foundation in the language or history of the statute. A holding that Pedro Morales is not a "public official" can in no way be attributed to ambiguity on the part of the legislature. Rather, it would seem, *Del Toro* has, by judicial fiat, unreasonably narrowed the purview of what Congress has always considered to be its broad bribery statute.

CONCLUSION

**The order of the District Court should be reversed
and Loschiavo's 2255 petition should be dismissed.**

Respectfully submitted,

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Olga P. Grunpp

being duly sworn
deposes and says that he is employed in the office of the
United States Attorney for the Southern District of New
York.

Stating also that on the *20th* day of *October, 1975*
she served a copy of the within *(2) Briefs + Appendix.*
by placing the same in a properly postpaid franked envelope
addressed:

*Martimer Todel, Esq.,
1 Rockefeller Plaza.
N.Y. N.Y. 10020*

And deponent further says that she sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Courthouse, Foley Square, Borough of Manhattan, City
of New York

Olga P. Grunpp

Sworn to me before this

20th day of *October, 1975*

Mary L. Avent
MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977